

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 7
MICHAEL F. ANTONELLI and)	CASE NO. 17-64177-PMB
NOREEN A. ANTONELLI,)	
Debtors.)	
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NEIL C. GORDON, Chapter 7 Trustee for)	
the Estates of Michael F. Antonelli and)	
Noreen A. Antonelli,)	
Plaintiff,)	
v.)	CONTESTED MATTER
PNC BANK, N.A. f/k/a)	
RBC CENTURA BANK,)	
WELLS FARGO BANK, N.A.,)	
CHATHAM PARK COMMUNITY)	
ASSOCIATION, INC.,)	
FULTON COUNTY TAX COMMISSIONER,)	
MICHAEL F. ANTONELLI and)	
NOREEN A. ANTONELLI,)	
Respondents.)	
)	

SUPPLEMENT TO TRUSTEE'S MOTION FOR (I) AUTHORITY TO (A) SELL PROPERTY OF THE BANKRUPTCY ESTATE FREE AND CLEAR OF ALL LIENS, INTERESTS, AND ENCUMBRANCES AND (B) DISBURSE CERTAIN PROCEEDS AT CLOSING AND (II) APPROVAL OF SURCHARGE UNDER 11 U.S.C. SECTION 506(c)

COMES NOW Neil C. Gordon, as Chapter 7 Trustee for the bankruptcy estates of Michael F. Antonelli and Noreen A. Antonelli ("Trustee"), pursuant to 11 U.S.C. §§

363(b), (f), and (m), and Fed. R. Bankr. P. 2002(a)(2), 6004(a), 6004(c) and 9014, by and through undersigned counsel, and files this *Supplement to Trustee's Motion for (I) Authority to (A) Sell Property of the Bankruptcy Estate Free and Clear of Liens, Interests, and Encumbrances and (B) Disburse Certain Proceeds at Closing, and (II) Approval of Surcharge Under 11 U.S.C. Section 506(c)* (the "**Supplement**"). In support of the Supplement, Trustee respectfully shows the Court as follows:

1. On July 3, 2018, Trustee filed *Trustee's Motion for (I) Authority to (A) Sell Property of the Bankruptcy Estate Free and Clear of Liens, Interests, and Encumbrances and (B) Disburse Certain Proceeds at Closing, and (II) Approval of Surcharge Under 11 U.S.C. Section 506(c)* [Doc. No. 45] (the "**Sale Motion**").¹

2. The Sale Motion came on for hearing before the Bankruptcy Court on July 30, 2018 (the "**Hearing**").

3. At the Hearing, Trustee argued for the first time that, if the interest of PNC in the Property has priority over the interest of Wells Fargo, he could sell the Property free and clear of the interest of Wells Fargo under 11 U.S.C. § 363(f)(5).

4. The Court asked Trustee to supplement the Sale Motion with legal authority for this argument.

Supplemental Authority

a. Sale Free and Clear under 11 U.S.C. § 363(f)(5)

5. To supplement those arguments set forth in the Sale Motion and at the Hearing, if PNC has a first priority security interest in the Property superior to the

¹ Capitalized terms not defined in this Supplement shall have the meanings ascribed to them in the Sale Motion.

interest of Wells Fargo, Trustee can sell the Property free and clear of the interest of Wells Fargo under 11 U.S.C. § 363(f)(5), as set forth in more detail below.

6. A trustee may sell property free and clear of a junior security holder's interest under Section 363(f)(5) of the Bankruptcy Code if the interest of the junior security holder can be eliminated under State foreclosure sale proceedings. *See In re Jolan, Inc.*, 403 B.R. 866 (Bankr. W.D. Wash. 2009); *In re Boston Generating, LLC, et al.*, 440 B.R. 302 (S.D. N.Y. 2010); *In re Wrangell Seafoods, Inc.*, Case No. K09-00012-DMD, slip op. at 2-3 (Bankr. D. Alaska March 9, 2009). Under Georgia law, both a foreclosure sale under power of sale and a judicial foreclosure sale cut off inferior liens, claims, and encumbrances in and to the foreclosed property. *See Rockmart Bank v. Doster*, 213 S.E.2d 645 (Ga. 1975) (stating that a foreclosure sale under a power of sale divests all junior encumbrances on the property); *Parker v. Cherokee Bldg. Supply Co.*, 64 S.E.2d 51 (Ga. 1951) (stating that the purchaser at a judicial foreclosure sale obtains full title to the subject property). In this case, because the debt secured by the PNC Deed is in default, and assuming the PNC Deed is in first position, all junior interests, including the interest of Wells Fargo, could be divested under applicable State law.

b. Alternative Basis for Sale Free and Clear of Interest of Wells Fargo under 11 U.S.C. § 363(f)(1) and (5)

7. In addition, even if the interest of Wells Fargo is superior to that of PNC, and even if the Court concludes that there is no bona fide dispute, which Trustee does not believe that it should, Trustee can still sell the Property free and clear of all liens, claims, interests, and encumbrances as a result of Georgia receivership law.

8. Under O.C.G.A. § 9-8-6, a state court receiver has the express authority to sell free and clear of interests. While many States lack a similar provision, Trustee's ability to look to Georgia state law is sufficient to satisfy 11 U.S.C. § 363(f)(5) and allow Trustee to sell the Property free and clear. Receiverships are grounded in equity, and in such an equitable proceeding, the receiver can compel an entity to accept a money satisfaction of its interest. Thus, both Sections 363(f)(1) and (5) of the Bankruptcy Code are satisfied by Georgia's receivership laws with respect to senior and junior liens. *See e.g., In re Jolan*, 403 B.R. 866 (Bankr. W. D. Wash. 2009) (applying Washington state's more restrictive receivership laws as the basis for satisfaction of the requirements of section 363(f) and noting that it would apply even to non-consenting first mortgages).

WHEREFORE, Trustee respectfully requests that the Court enter an Order:

- (a) Granting the Sale Motion, as supplemented; and
- (f) Granting Trustee such other and further relief as the Court deems just or appropriate.

Respectfully submitted this 31st day of July, 2018.

ARNALL GOLDEN GREGORY, LLP
Attorneys for Trustee

By: /s/ Neil C. Gordon
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CERTIFICATE SERVICE

This is to certify that I, Neil C. Gordon, am over the age of 18 and that on this day I have caused to be served a copy of the forgoing *Supplement to Trustee's Motion for (I) Authority to (A) Sell Real Property of the Bankruptcy Estate Free and Clear of All Liens, Interests and Encumbrances, and (B) Disburse Certain Proceeds at Closing, and (II) Approval of Surcharge Under 11 U.S.C. Section 506(c)* by depositing in the United States mail a copy of same in a properly addressed envelope with adequate postage affixed thereon to assure delivery by first class United States Mail or certified mail, as indicated, to the following persons at the addresses stated:

Via First Class Mail:

Office of the United States Trustee
362 Richard B. Russell Bldg.
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Via First Class Mail and Certified Mail:

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This 31st day of July, 2018.

/s/ Neil C. Gordon
Neil C. Gordon
Georgia Bar No. 302387